



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374

IN REPLY REFER TO:
5720
Ser 14/018
October 23, 2015

Dr. Jason Manne
Pitt Law Veterans Practicum
3900 Forbes Avenue
Pittsburgh, PA 15260

SUBJECT: FREEDOM OF INFORMATION ACT (FOIA) APPEAL
DON-NAVY-2015-009361

This responds to your letter of September 8, 2015, which was received by our office on September 16, 2015. Your letter appeals the Naval Criminal Investigative Service (NCIS) response to your April 12, 2015 FOIA request. Specifically, you appeal NCIS's redactions to the Secretary of the Navy's letter of censure dated January 23, 2015 and NCIS's determination that Vice Admiral (VADM) Michael Miller's retirement grade determination did not exist at the time of its response.

Your appeal is a request for a final determination under the FOIA. For the reasons stated below, I deny your appeal.

Prior to release of the Secretary of the Navy's letter of censure dated January 23, 2015, NCIS redacted information pursuant to Exemptions b(7)(A) and b(7)(E). I deny your appeal regarding these redactions.

A member of my staff has confirmed with NCIS that the information redacted from the letter of censure pertains to an active investigation and release of information compiled for that purpose would compromise further investigative steps. Under 5 U.S.C. § 552(b)(7)(A) information is exempted from disclosure that "could reasonably be expected to interfere with" enforcement proceedings. The information here is currently exempt from disclosure because: (1) law enforcement proceedings are pending or prospective; and (2) release of the information could reasonably be expected to cause some articulable harm. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978); *FBI v. Abramson*, 456 U.S. 615, 621 (1982). Specifically, I find that release of this information while law enforcement proceedings are still pending can reasonably be expected to cause harm to the ability of law enforcement officials conducting this investigation to effectively find witnesses and evidence related to possible misconduct. Premature release of such information can inappropriately and adversely affect the possible testimony of

witnesses to such proceedings. I find that NCIS has satisfied this two-part test, and accordingly, no information contained in this ongoing investigation will be released at this time.

However, once such enforcement proceedings are complete, to include both criminal and possible administrative sanctions, you may resubmit a new request for this information. NCIS will then review the information and determine whether such information can be released at that time. You will have the opportunity to appeal their determination to this office.

NCIS also redacted information contained in the letter of censure pursuant to Exemption b(7)(E). Exemption b(7)(E) affords protection to law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions." In this case, the redacted information pertains to law enforcement techniques and procedures in that it would disclose who NCIS interviewed, who was present at these interviews, and in what order the interviews occurred. Therefore, I deny your appeal regarding these redactions.

Finally, at the time of its response, NCIS did not release VADM Miller's retirement grade determination because such documents did not exist at the time you submitted your request. I find that this was an appropriate response and deny your appeal regarding the retirement grade determination. Federal courts have consistently held that federal agencies are only required to release those documents that exist as of the date of the FOIA request. However, since NCIS provided its response to your FOIA request, VADM Miller's retirement grade determination has been made. As a result, I am referring your appeal back to NCIS for consideration of your request for documents under the cognizance of the Department of the Navy related to VADM Miller's retirement grade determination. For additional information regarding the status of the processing of this request, the point of contact at NCIS's FOIA office, LCDR Karen

(b) (6) can be reached by phone at (b) (6) or by email at (b) (6)@ncis.navy.mil.

After NCIS makes its determination regarding the release of VADM Miller's retirement grade determination, you will have the opportunity to appeal that determination to this office.

Additionally, because the final retirement grade determination was made in the Office of the Secretary of Defense, your request has been referred to the Office of the Secretary of Defense and Joint Staff (OSD/JS) FOIA Requester Service Center for consideration of your request for documents under the cognizance of the Department of the Defense

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related to VADM Miller's retirement grade determination. For additional information regarding the status of the processing of this request, the point of contact is (b) (6) (b) (6) who can be reached at (b) (6) or at the address below.

OSD/JS FOIA Requester Service Center
Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155
Fax (571) 372-0500

After DoD's FOIA Requester Service Center has made its determination regarding the release of VADM Miller's retirement grade determination, you will have the opportunity to appeal their determination. Though this office is not the appellate authority for DoD's FOIA Requester Service Center, the Service Center will inform you where an appeal can be filed should you disagree with the Service Center's determination.

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for this final decision. You may seek judicial review of this decision.

Should you have further questions or concerns, my point of contact is LT Zachary (b) (6) JAGC, USN, who may be reached by email: (b) (6) @navy.mil or by telephone: (b) (6)

Sincerely,

(b) (6)

G. E. LATTIN
Director
General Litigation Division

Copy to:
DNS-36
NCIS